78-1887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. [redacted]

WILLIAM MAULDIN SMITH,

Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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STATEMENT OF THE CASE.

Petition Number 78-1187 arises from the judgment of the Supreme Court of Illinois in the case of *In Re Smith*, case number 50871, entered January 26, 1979, 75 Ill. 2d 134, 387 N. E. 2d 316. Respondent submits the following in opposition to that *Petition*.

STATEMENT OF FACTS.

On January 26, 1979, the Supreme Court of Illinois handed down its opinion disbarring the Petitioner William Mauldin Smith. The decision of the Court below was based on its finding that Petitioner had converted clients' funds to his own use.

Respondent refers this Court to the opinion of the Court below (attached as Appendix A to the *Petition*).

QUESTIONS PRESENTED.

For the purpose of argument, Respondent will address the questions as raised by Petitioner.

REASONS FOR DENYING THE WRIT.

I.

THE PROCEEDING BELOW DID NOT DEPRIVE PETITIONER OF DUE PROCESS OF LAW IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioner argues that he was the unwitting victim of ineffective legal representation in the proceeding below. He contends that the performance of his attorney at the disciplinary hearing, "was of such low calibre as to amount to no representation and to reduce the proceedings to a farce and sham." (Petition, p. 9.) Petitioner makes this claim despite the fact that he was represented by an attorney of his own choosing. *In Re Smith*, 75 Ill. 2d 134, 387 N. E. 2d 316 (1979). Further, as the Court below pointed out, Petitioner did not express any dissatisfaction with his attorney at the hearing.

Petitioner's argument is based on the theory that there is a due process right to effective assistance of counsel at a disciplinary proceeding. Certainly the right to counsel is guaranteed by the Sixth Amendment and is applicable to the States by virtue of the Fourteenth Amendment, thus making it unconstitutional to try a person for a felony in a state court unless he has a lawyer or has validly waived one. *Burgett* v. *Texas*, 389 U. S. 109, 114 (1967); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). It is important to note however, that the right to assistance of counsel exists only in a criminal case where the defendant is

unable to employ counsel or is incapable of adequately making his own defense. *Powell* v. *Alabama*, 287 U. S. 45, 66 (1932). A person accused of a crime requires the "guiding hand of counsel at every step in the proceedings against him." *Id.*, 287 U. S. at 69.

An attorney disciplinary proceeding however, is not a criminal matter, and as such there is no due process guarantee of assistance of counsel.[1] Petitioner's reliance upon the Sixth and Fourteenth Amendments to support his Petition for Writ of Certiorari is therefore misplaced. Petitioner fails to recognize that the purpose of a disbarment proceeding is not to punish an attorney, but to preserve the courts of justice from the official ministration of persons unfit to practice in them. *Ex Parte Wall*, 107 U. S. 265, 288 (1882). Attorney disciplinary proceedings are deemed to be free of any due process defects, so far as procedure is concerned, if the basic requirements of notice and hearing are met. *In re Ruffalo*, 390 U. S. 544, 550-551 (1968). The record below reveals that the Petitioner was afforded both notice of the charge and an opportunity to defend. The essence of an attorney disciplinary proceeding is not to decide on matters regarding the alleged criminality of a person's acts, but rather to determine the moral fitness of an attorney to continue in the practice of law. *In re Daley*, 549 F. 2d 469, 475 (7th Cir., 1977); *cert. den.* 434 U. S. 829 (1977).

Nevertheless, Petitioner claims that the criminal law concept of effective assistance of counsel *should* be applicable to disbarment proceedings because, "their nature and function are sufficiently analogous." (*Petition*, p. 7.) In support, Petitioner relies upon the decisions of this Court in the area of criminal procedure.[2] He cites no case to support his conjecture.

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1. Illinois attorney disciplinary proceedings, "shall be conducted according to the practice of civil cases" and with the standard of proof in all hearings fixed as clear and convincing evidence. *Ill. Rev. Stat.* ch. 110A, 753(c) (1977).

2. *See, e.g., Glasser* v. *United States*, 315 U. S. 60 (1941); *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973); *Faretta* v. *California*,

(Footnote continued on next page.)

II.

THE COURT BELOW CORRECTLY DETERMINED THAT THE FOURTEENTH AMENDMENT DOES NOT MANDATE A BIFURCATED HEARING PROCEDURE IN AN ATTORNEY DISCIPLINARY ACTION.

The states have a compelling interest in the practice of the legal profession within their boundaries. *Goldfarb* v. *Virginia State Bar Association*, 421 U. S. 773, 792 (1975). Lawyers have historically been "officers of the court". *See, e.g., In re Primus*, 436 U. S. 412, 422 (1978). In Illinois, the power to discipline an attorney is inherent in the Supreme Court of Illinois. *In re Teitelbaum*, 13 Ill. 2d 586, 150 N. E. 2d 873, *Cert. Denied* 358 U. S. 881, *Rehearing Denied* 358 U. S. 923 (1958).

The Petitioner nonetheless claims that Illinois attorney disciplinary proceedings which require a lawyer to present evidence in mitigation, if any, prior to a determination of whether he acted unethically, violates due process (*Petition*, pp. 11-13.) He suggests that the Fourteenth Amendment requires a bifurcated hearing procedure with separate hearings on "guilt" and "sanctions", instead of the combined system used in Illinois.

Although he extensively relies on criminal law authority to underlie his argument, the Petitioner cites no authority which holds that a bifurcated hearing procedure is either necessary or desirable. The decisions referred to differ significantly from the present case and are not inconsistent with the decision of the Court below in any way.

Petitioner misunderstands the nature of disciplinary proceedings in Illinois. An attorney disciplinary proceeding is an original proceeding in the Illinois Supreme Court. *In re Taylor*, 6 Ill. Dec. 898, 363 N. E. 2d 845 (1977); *In re Donaghy*, 393

(Footnote continued from preceding page.)
422 U. S. 806 (1975); *Desist* v. *United States*, 394 U. S. 244 (1969).

Ill. 621, 66 N. E. 2d 856 (1946). While the findings and recommendations of the hearing board are entitled to some weight, ultimate responsibility for imposition of discipline rests with the Supreme Court of Illinois. *In re Royal*, 29 Ill. 2d 458, 194 N. E. 2d 242. Since it is the Supreme Court of Illinois which imposes discipline after a review of the entire record, it is not clear what purpose would be served by a separate "sanctions" hearing before the hearing board.

Petitioner had every opportunity to submit evidence of mitigation at the hearing. He failed to do so. By evidence that was clear and convincing, he was found to have converted client funds and to have made false representations to the clients. He now claims that a bifurcated hearing procedure is guaranteed by the Fourteenth Amendment. The Court below correctly determined that the Fourteenth Amendment does not mandate a bifurcated hearing procedure in an attorney disciplinary action.

CONCLUSION.

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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JAMES J. GROGAN, Senior Law Student, licensed pursuant to Rule 711 of the Supreme Court of Illinois, Loyola University of Chicago, assisted in the research and preparation of this brief.